UNITED MALAYAN BANKING CORP BHD

v.

ERNEST CHEONG YONG YIN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-03-50-1996]
10 FEBRUARY 2001

LIMITATION: *Interest - Arrears - Whether claim barred by s. 6(3) Limitation Act 1953*

CIVIL PROCEDURE: *Interest - Arrears - Whether claim barred by s. 6(3) Limitation Act 1953*

BANKRUPTCY: *Notice - Interest - Arrears - Whether claim barred by s. 6(3) Limitation Act 1953*

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Notice of appeal filed out of time - Appeal against striking out of bankruptcy notice - Whether preliminary objection well taken - Rules of court and administration of civil justice - Courts of Judicature Act 1964 - Bankruptcy Act 1967 - Bankruptcy Rules 1969*

The judgment creditor ('appellant') appealed against the decision of the judicial commissioner that the bankruptcy notice was invalid. The appellant contended that judgment was obtained on 15 October 1987 and that the bankruptcy notice was claiming interest up to 14 October 1993, a period not later than six years. The judgment debtor ('respondent') argued that if at all the appellant was entitled to claim interest it could only be claimed up to 31 March 1992, *ie*, six years from 1 April 1986. Therefore, since the bankruptcy notice was filed out of time on 24 January 1996 no interest could be claimed at all.

Held:
Per Abu Mansor Ali JCA

[1] The bankruptcy notice had not only included interest prior to the judgment but the claim of interest was also after the six years prescribed by s. 6(3) Limitation Act 1953. The judicial commissioner had not erred in his decision.

Per Ahmad Fairuz JCA

[1] The decision appealed against was given on 25 June 1996 and the appellant's notice of appeal was filed on 22 July 1996. Pursuant to the Courts of Judicature Act which provides for a one-month period to file a notice of appeal the appellant was within time. However, if the Bankruptcy Act and Rules were applicable, then it would appear that the appellant was out of time by virtue of the 14-day time limit.

[2] Nevertheless, the respondent's preliminary objection that the appellant's notice of appeal was filed out of time was a mere technicality and should not be allowed. A procedural and technical objection such as this should not be allowed to obstruct the process of giving justice to the deserving party by going into the substantive issues before the court.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemiutang penghakiman ('perayu') merayu terhadap keputusan pesuruhjaya kehakiman yang telah memutuskan bahawa notis kebankrapan tersebut adalah tidak sah. Perayu telah menegaskan bahawa penghakiman telah diperolehi pada 15 Oktober 1987 dan notis kebankrapan tersebut menuntut faedah sehingga pada 14 Oktober 1993, satu tempoh yang tidak lewat daripada enam tahun. Penghutang penghakiman ('responden') telah berhujah bahawa jika sekalipun perayu berhak untuk menuntut faedah ianya hanya boleh dituntut sehingga 31 Mac 1992 iaitu enam tahun dari 1 April 1986. Dengan itu, oleh kerana notis kebankrapan tersebut telah difailkan di luar masa pada 24 Januari 1996 maka tiada faedah boleh dituntut sama sekali.

Diputuskan:
Oleh Abu Mansor Ali HMR

[1] Notis kebankrapan tersebut bukan sahaja telah memasukkan faedah sebelum penghakiman tetapi tuntutan faedah adalah juga selepas tempoh enam tahun seperti yang diperuntukkan oleh s. 6(3) Akta Penghadan 1953. Pesuruhjaya kehakiman telah tidak tersalah dalam keputusannya.

Oleh Ahmad Fairuz HMR

[1] Keputusan terhadap mana dirayui telah diberi pada 25 Jun 1996 dan notis rayuan perayu telah difailkan pada 26 Julai 1996. Selaras dengan Akta Mahkamah Kehakiman yang telah memperuntukkan tempoh satu bulan untuk memfailkan notis rayuan perayu adalah dalam temph masa yang telah ditetapkan. Tetapi jikalau Akta Kebankrapan dan kaedah-kaedahnya dipergunakan, perayu boleh dikatakan di luar tempoh masa mengikut tempoh terhad 14 hari.

[2] Namun demikian, bantahan awal responden bahawa notis rayuan perayu telah difailkan di luar tempoh masa hanya atas dasar teknikal semata-mata dan tidak seharusnya dibenarkan. Bantahan atas dasar prosedur dan teknikal seperti ini tidak patut dibenarkan untuk menyekat proses memberikan keadilan kepada parti yang patut menerimanya dengan mengambilkira isu-isu yang berlanjutan di hadapan mahkamah.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***
Cropper v. Smith [1884] 26 Ch D 700 ***(refd)***
Imtiaz Ahmad v. Ghulam Ali PLD [1963] SC 382 ***(refd)***
Malaysian Soil Investigation Holdings Sdn Bhd v. EMKO [1994] 1 CLJ 267 ***(refd)***
Re Yamaha (Malaysia) Sdn Bhd [1990] 3 MLJ 317 ***(refd)***
Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 2 MLJ 188 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 42(1)
Limitation Act 1953, s. 6(3)

For the appellant - Rohaine Mohd Shim (Ashmadi Othman with him); M/s Che Mokhtar & Co
For the respondent - Colin Andrew Pereira; M/s Ong Manickam & Co

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D5-29-220-96]

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Mansor Ali JCA:

My learned brother had, in his grounds of judgment, dealt with the preliminary points raised by the respondent. I had read the judgment and I agree with him. In this grounds of judgment I shall deal with the substantive aspect of the appeal.

Cik Rohaine for the judgment creditor submitted that this appeal originated from the decision of the senior assistant registrar to the judge in chambers. The learned senior assistant registrar refused to strike out the bankruptcy notice of the judgment creditor dated 24 January 1996. The judgment debtor's ground for applying to strike out was because it was alleged that the amount of interest claimed was excessive as it included a sum, in the bankruptcy notice, which was said to be time barred under s. 6(3) of the Limitation Act 1953. As already stated above, the learned judicial commissioner held the bankruptcy notice was invalid. The appellant judgment creditor appealed.

The appellant herein contended that they followed the authority of *Re Yamaha (Malaysia) Sdn Bhd* [1990] 3 MLJ 317. On the authority of *Yamaha*, judgment was handed down on 19 May 1978. Interest was claimed up to 19 May 1984 which interest was from date of judgment plus six years. It was held that the claim of interest was properly made.

In our present case the appellant contended that judgment was obtained on 15 October 1987. The appellant in the bankruptcy notice is claiming interest up to 14 October 1993, a period of not later than six years, although the bankruptcy notice was filed much later on 24 January 1996. It might be they have quantified interest up to the filing of the bankruptcy notice, the appellant was actually claiming interest up to only 14 October 1993. The appellant relies substantially on this *Yamaha* case.

The respondent judgment debtor on the other hand had asked that this appeal be dismissed with costs on the ground that the bankruptcy notice served by the appellant is bad and the respondent had disputed the sum within seven days by filing a summons in chambers therefore.

The respondent referred the court to p. 37 of the appeal record where the appellant, in this case, claimed interest is alleged to be due from 1 April 1986 on a judgment sum of RM95,864.93. The judgment was on 15 October 1987. As stated in the bankruptcy notice the interest claimed is from 1 April 1986, a period of 18 months prior to the judgment up to 24 January 1996, when the bankruptcy notice was filed.

The respondent argued strongly that if the appellant says that the date the interest became was due on 1 April 1986, as claimed by him then the respondent submitted, if at all the appellant is entitled to claim interest it would be clearly six years from 1 April 1986 which falls on 31 March 1992. The respondent emphasised further that if the bankruptcy notice was to be filed interest could only be claimed up to 31 March 1992. Therefore the respondent submitted that since the bankruptcy notice was filed out of time on 24 January 1996 no interest could be claimed at all.

In support of their argument the respondent relied on the case of *Malaysian Soil Investigation Holdings Sdn Bhd v. EMKO* [1994] 1 CLJ 267 where the claim for interest made was within the six years period whereas in the present case under appeal the claim of interest is made after the expiry of six years' period.

After hearing and considering the submissions of both counsels I uphold the substantial submission of the respondent's counsel that the bankruptcy notice in this appeal had as not only having included interest prior to the judgment but also the claim of interest was after the six years period barred by s. 6(3) of the Limitation Act 1953. Section 6(3) of the Limitation Act 1953 provides:

> Section 6(3). An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect to of any judgment debt shall be recovered after the expiration of six years on which the interest became due.

It was clear to me that the material words of s. 6 is the judgment and the arrears of interest is the arrears of judgment debt, still referring to the judgment debt. That being my decision I confirm the judicial commissioner had not erred in his decision and I dismiss this appeal with costs.

Ahmad Fairuz JCA:

This appeal was heard on 23 and 24 February 1998 and judgment was reserved. Since then, NH Chan JCA, the chairman of this court, had retired and it therefore falls on the remaining two members of the panel, ie, Abu Mansor JCA (now FCJ) and I, Ahmad Fairuz Sheikh Abdul Halim JCA (now FCJ) to determine this appeal by virtue of s. 42(1) of the Courts of Judicature Act 1964.

This appeal by the judgment creditor is against the decision of the learned judicial commissioner RK Nathan (as he then was) who held on 23 May 1997 as follows:

> I would therefore agree with the learned judge in Malaysian Soil to this extent. I therefore allowed the appeal and set aside the order of the learned SAR dated 26.4.96 as the act of recovery, ie, the issuance of the BN on 24.1.96 was well past the date when limitation had set in. I had earlier indicated that I would deal with section 131 in the later part of my judgment. As the issue on the amount of interest claimable is one of great import, I am of the view that section 131 cannot be used to cure the defect which goes to the root of the BN. UMBC is therefore not entitled to recover the interest sums of RM106,863.04 and RM72,433.97. As such the BN is invalid and has to be struck out.

At the outset of the appeal, two preliminary points were raised by the respondent. The first point was on the competency of the appeal as the appellant had not obtained leave. After being informed by the appellant, that under the Practice Direction of the Court of Appeal no leave was required in bankruptcy matters, the respondent abandoned this point. The other remaining point pertained to the fact that the appeal was out of time. The learned respondent's counsel submitted that the notice of appeal was filed on 22 July 1996 whilst the decision appealed against was made on 25 June 1996. It is clear that the notice of appeal was filed more than 14 days but less than one month after the date of the judgment. The Courts of Judicature Act and its rules provide for a one-month period to file the notice of appeal whilst the Bankruptcy Act and its rules provide for a 14-day time period. The appellant

clearly had complied with the Court of Judicature Act and its rules but not the Bankruptcy Act and its rules. Assuming that we are right in holding that the Bankruptcy Act and its rules are the applicable law, then the appellant had clearly not complied with the Act and its rules. On this matter, we are reminded of what Bowen LJ, said when he was dealing with the power of amendment in a letter's patent case of *Cropper v. Smith* [1884] 26 Ch D 700. At p. 710 he said:

> Now it is true that under 15 & 16 Vict. C. 83, s. 41, you must give notice of an objection to the validity of the patent if you wish to raise the objection, but there is a power even in that statute for a Judge at Chambers to amend, and to allow you at the last moment to cure any laches or error of judgment, and what a judge could do at Chambers, a Judge could do in Court. Moreover, every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think *it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases* by deciding otherwise than in accordance with their rights. Speaking for myself, an in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. *Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy*, and I do not regard such amendment as a matter of favour or of grace.

Our Federal Court in the case of *Tan Chwee Geok & Anor. v. Khaw Yen-Yen & Anor.* [1975] 2 MLJ 188 at p. 189 said:

> *The rules* of the Supreme Court *are intended to facilitate, not impede, the administration of civil justice.*
>
> In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
>
> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
>
> This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear:*
>
> > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and *the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.*

And in the same case Ali FCJ, said (at p. 192):

> The general principle, I think, is that rights of parties is an action are not to be defeated by technical objections

In this connection we would also like to quote what this court had said in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283, at p. 293 ie:

> ... After all, courts exist to do justice according to the law as applied **to the substantial merits of a particular case** ...

Kaikaus J, in *Imtiaz Ahmad v. Ghulam Ali PLD* [1963] SC 382 at p. 400 said:

> **Any system which** by giving effect to the form and not to the substance **defeats substantive rights is defective to that extent.** The ideal must always be a system that gives to every person what is his.

Bearing in mind the abovementioned authorities, I fell that the preliminary objection should not be allowed. The objection is indeed on a mere technicality. The notice of appeal had been filed anyway. Such procedural technical objection should not, in my view, be allowed to obstruct the process of giving justice to the deservings by going into the substantive issues of the matters before the court. Hence we overruled the preliminary objection.

My learned brother had written a separate grounds of judgment which deals with the substantive issue in the appeal. I had read his judgment and for the reasons stated therein I agree that the appeal should be dismissed with costs.